Supreme Court, U.S.
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No. 06-

In the Supreme Court of the United States

In re M2 SOFTWARE, INC.

M2 SOFTWARE, INC.,
Petitioner,

v.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (Real Parties In Interest: Madacy Entertainment, Handleman Company, SFX Entertainment, M2 Communications, L.L.C., Gaylord Entertainment, Jeffory Moseley)
Respondents

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS

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QUESTION PRESENTED

1. Whether this Court should grant mandamus to direct the United States Court of Appeals for the Ninth Circuit to enforce the nondiscretionary, automatic and mandatory recusal statute of 28 U.S.C. § 455 to recall the mandates, vacate the opinions, and reassign the underlying appeals where the authoring Judge held a direct financial interest in the subject matter in controversy and in a real party in interest to the proceedings.

RULE 29.6 STATEMENT

Petitioner is M2 Software, Inc. (hereinafter "M2"). Petitioner has no parent corporation and there is no publicly held company owning 10% or more of Petitioner's stock.

Respondent is the United States Court of Appeals for the Ninth Circuit. This matter concerns the failure of The Hon. Harry Pregerson to recuse himself from participating in two appeals in which he held a financial interest and the failure of the Court of Appeals to recall the mandates, vacate the judgments, and reassign the appeals when the structural due process violation was discovered after the judgments had been entered.

Defendant-Respondents:

In *M2 Software, Inc. v. M2 Communications, et al* (U.S.C.A. 03-56602) ((hereinafter "*M2 Communications*" or "*M2Comm*"): M2 Communications, LLC; Gaylord Entertainment; Jeffory Moseley.

In *M2 Software, Inc. v. Madacy Entertainment, et al* (U.S.C.A. 03-55957) (hereinafter "*Madacy*"): Madacy Entertainment; Handleman Company; SFX Entertainment.

Other Parties with a Financial Interest in the Outcome of this Proceeding:

Time Warner, Inc.
Warner Music Group
Clear Channel Entertainment
Viacom, Inc.
Viacom International, Inc.
MTV Networks Company

A Petition for a Writ of Certiorari to address a narrow, but recurring, federal question in the present cases has been concurrently filed. A different Petition in a related case may be affected by the outcome of the present Petition. *M2 Software, Inc. v. M2 Communications, Inc.* (U.S.S.C. 06-515).

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Petitioner M2 Software, Inc. (hereinafter "M2"), requests that this Court issue a Writ of Mandamus directing the United States Court of Appeals for the Ninth Circuit to recall the mandates, vacate the judgments, and reassign the appeals in the *M2 Communications* and *Madacy* cases to a new and different panel of judges.

OPINIONS BELOW

The published Order of the Ninth Circuit in *M2 Software, Inc. v. M2 Communications, et al* (U.S.C.A. 03-56602) is reported at 463 F.3d 868) and reproduced in the Appendix hereto ("App.") at 1a. The published Order of the Ninth Circuit in *M2 Software, Inc. v. Madacy Entertainment, et al* (U.S.C.A. 03-55957) is reported at 463 F.3d 870 and reproduced in the Appendix at 4a. A single Petition is submitted for a Writ of Mandamus in the two related cases as they concern substantially identical Orders decided by the same panel of judges and concerning the same question, with mandamus required to direct the same court to fulfill the same nondiscretionary duty. *See* Sup. Ct. Rule 12.4 (instructing single petition for analogous situation in certiorari context).

JURISDICTION

The court of appeals entered its published Orders on August 21, 2006. The court of appeals denied M2 Software's petitions for rehearing *en banc* on October 26, 2006. App. 7a-8a. This Court's jurisdiction is based on 28 U.S.C. § 1651 . Sup. Ct. Rule 20.3.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, United States Constitution [App. 9a] provides, in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

See Tumey v. Ohio, 273 U.S. 510, 523, 534 (1927); *Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002) ("an impartial judge is essential to due process").

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 455 [App. 10a] provides, in pertinent part, that a United States judge:

(a) * * * shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) * * * shall also disqualify himself in the following circumstances: * * * *

> 4) he knows that he * * * has a financial interest in the subject matter in controversy or in a party to the proceeding.
>
> 5) He * * *
>
> (i) Is a party to the proceeding * * * *
>
> (iii) Is known * * * to have an interest that could be substantially affected by the outcome of the proceeding.

(c) * * * shall inform himself about his personal * * * financial interests * * *

(d) * * * (4) "financial interest" means ownership of a legal or equitable interest, however small * * *

(e) No * * * judge * * * shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b) * * *.

28 U.S.C. § 46(b) [App. 13a] requires an appellate panel of a minimum of three judges:

> In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges * * *. The United States Courts of Appeals * * * may determine by rule the number of judges, not less than three, who constitute a panel * * *.

28 U.S.C. §144 [App. 15a] provides, in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

STATEMENT OF THE CASE

I. Introduction and Summary

Petitioner seeks a Writ of Mandamus directing the United States Court of Appeals for the Ninth Circuit to recall the mandates, vacate the judgments, and reassign the *M2 Communications* and *Madacy* appeals to a new and different panel of judges. The Ninth Circuit had a nondiscretionary duty to grant Petitioner's motion to enforce the mandatory, nonwaivable, and automatic recusal statute of 28 U.S.C. § 455. The Honorable Harry Pregerson, Judge in the Court of Appeals for the Ninth Circuit, should have been disqualified because he was an owner of equity in a real party in interest and in the subject matter in controversy in the two related cases on which he ruled. The cases involved claims of trademark infringement, trade name infringement, unfair competition, and (in *M2 Communications*) a claim of fraudulent transfer of an infringing division to Time Warner, Inc.

A Judge's knowledge that he has any "financial interest in the subject matter in controversy or in a party to the proceeding" – even a single share of stock – triggers the nondiscretionary and automatic recusal requirement of 28 U.S.C. § 455(b). In April 2006, the *Washington Post* published an investigative report on judicial ethics revealing that Judge Pregerson owned an equity stake in Time Warner, Inc. At that time, at the very latest, Judge Pregerson knew that he held a conflicting financial interest on the decisions that he authored. Time Warner, Inc. not only owned the subject matter in controversy, it was also a real party in interest to the litigation. It was identified in the complaint as the receiving entity of an alleged fraudulent transfer that the lawsuit sought to void. Upon learning of Judge Pregerson's financial interest, Petitioner promptly filed its motion to recall the mandates, vacate the judgments, and assign the appeals to a new panel of judges.

The United States Court of Appeals for the Ninth Circuit had a non-discretionary duty to enforce the man-

datory recusal provisions of 28 U.S.C. § 455 and grant Petitioner's motion. The Ninth Circuit failed to do so, allowing the panel to *self-determine* and deny a motion that would have required Judge Pregerson, author of the lead decision of the related cases, to find himself in violation of the mandatory federal statut .

While the appeals were ongoing, Time Warner, Inc. executed the sale and option repurchase of the primary division involved in both cases, Warner Music Group. Pursuant to S.E.C. filings, Warner Music Group was "Time Warner Inc.'s music division" until "substantially all" of the division was subject to the sale and option-buyback of March 1, 2004 (the "**WMG Transaction**").[1] Judge Pregerson relied upon this sale – entirely disregarding the earlier time period of infringement – to deny the Petitioner's motion to recall the mandates, vacate the opinions, and reassign the appeals. Only by overlooking this pre-2004 period of Time Warner, Inc.'s full 100% ownership of the music division could Judge Pregerson conclude that "Time Warner was not a party to the suit" and that Time Warner only "had an *option* to purchase 19.9% of a company [Warner Music Group]." App. 1a-2a, 4a-5a (emphasis in original).

In deciding the Orders below, Judge Pregerson and the underlying panel rejected the request of the Petitioner that a new Judge or panel hear the motion. In addition to the mandamus question raised herein, a narrow issue is raised for certiorari (separate Petition for Writ of Certiorari filed concurrently herewith) as to whether a Judge at the Court of Appeals level may self-determine a motion for his own recusal under 28 U.S.C. § 455.

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[1] Supp. Decl. of Mark L. Pettinari in Supp. of MTR ("*MLPSupp.*") ¶2, Ex. 1 at 3. In the WMG Transaction, Time Warner, Inc. sold shares in its formerly 100% owned music division via a $2.6 billion sale in which it repurchased convertible securities for a 19.9% equity interest (a half-billion dollar stake) in the former division – now known as "Warner Music Group" – through stock options that were not due to expire until 2007, long after the conclusion of the appeal. *MLPDecl.* ¶4, Ex.3 at 15.

II. Background of the Case

Petitioner is a Delaware corporation that started its life as a record label in 1991. Petitioner expanded into an interactive music content market segment and a "music industry infrastructure" market segment in which it provides record label databases and record label administration services to major record labels. Petitioner has provided its products and services under its **M2** trademark and trade name for over fifteen years and owns an incontestable federal registration for the trademark. U.S. TM Reg. No. 1,931,182. Petitioner is the senior owner of the **M2** mark in the music industry. *M2 Software, Inc. v. Viacom, Inc.*, 30 Fed.Appx. 710, 711 (9th Cir. 2002) ("*Viacom*") (Petitioner "indisputable senior user of the M2 mark").

The uses of an identical trademark in both of the present cases arose during the discovery phase in *Viacom*. Out of a universe of marks, two record label affiliates of Time Warner, Inc. (*Madacy* and *M2 Communications*) launched separate music industry ventures under the **M2** trademark and trade name. Both produced some of the same classes of products as Petitioner as identified in Petitioner's registration. U.S. TM Reg. No. 1,931,182. Both ventures appeared just weeks after a District Court in *Viacom* had rejected Viacom's defense that there was a "crowded field" of **M2** trademarks because Viacom had been unable to identify a single use of the **M2** trademark in the music industry other than that of Petitioner.[2]

The defendants in both new cases were related to Viacom, Inc. One named Defendant, Gaylord Entertainment, owned $613 million of Viacom, Inc. equity out

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[2] *M2 Software, Inc. v. Viacom, Inc.* (C.D. Cal. 98-CV-8734, Docket No. 61, Jan. 27, 1999), *Order Denying Prelim. Injunction*, at 8, 18 (finding Petitioner "likely to prevail" on its claims). Petitioner eventually received a permanent injunction on September 7, 2004 against Viacom's use of the marks "M2" or "M2: Music Television" in a case that is on appeal on related issues. (*Id.*, Docket No. 344, Sep. 7, 2004)

of total stockholder equity of $727 (a full 84% of the company) at the time of launch, and shared substantial production facilities, various employees, a common corporate director, and the same trademark attorneys with Viacom, Inc.[3] Another named Defendant, SFX Entertainment, was reported to be in merger negotiations with Viacom at the time of the **M2** launch.[4] Judge Pregerson, equity owner of Time Warner (Viacom's music partner),[5] entered rulings that prevented the bad faith conduct alleged under these circumstances from ever being tried.

The *M2 Communications* infringement was operationally launched by transferring an established musical group from Time Warner, Inc.'s Warner Alliance label to a newly-formed limited liability company branded with the **M2** trademark. *M2Comm* ER25-12/14; ER65-3. The company was formed on April 23, 1999, with an application filed at the Patent and Trademark Office ("PTO") on September 7, 1999. *M2Comm* ER50-12/13, ER69-6. The *Madacy* infringement was operationally launched by rebranding an existing product line manufactured by Time Warner, Inc.'s Warner Special Products with the **M2** trademark and division name. *Madacy* ER49-62/64; ER49-37; ER61-31. The *Madacy* venture adopted the **M2** trademark in "March or April" of 1999 with an application filed in the PTO on August 3, 1999. *Madacy* ER61-17; ER49-27/28.

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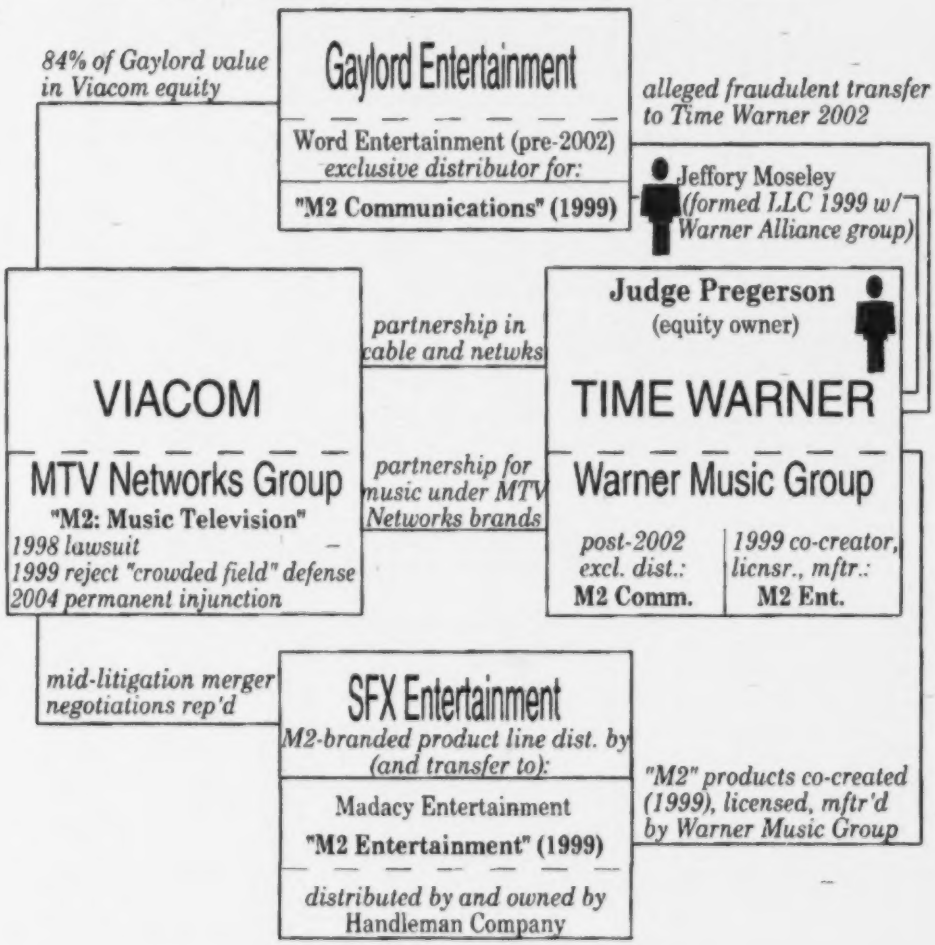
[3] *See M2Comm* ER25-28/30 (Securities and Exchange Commission records); ER04-08; ER50-14/15; ER67-6/7.

[4] *See* http://www.businessweek.com/2000 /0_10/b3671180.htm. *MLP Decl.* at 5, Ex. 4.

[5] Time Warner, Inc. operated several 50/50 joint venture partnerships in cable and networks with Viacom, and manufactured musical CD's and other record music products under Viacom's MTV Networks brands. http://www.pbs.org/wgbh/pages/frontline/shows/cool/giants/aoltimewarner.html; http://www.amazon.com/gp/search/?url=index%3Dblended&field-keywords=MTV.

Petitioner timely pursued the two new infringements in federal court and in Opposition proceedings before the PTO. On October 3, 2001, Petitioner commenced a trademark Opposition proceeding against the *M2 Communications* application. (T.T.A.B. Opp. No. 91/124,775). *M2Comm* ER04-8/9, 17/20. On January 4, 2002 Defendant Gaylord transferred Word Entertainment – the exclusive distributor of the *M2 Communications* infringement – to Time Warner, Inc. *M2Comm* ER39-4 (the "**TW-Word Acquisition**"). A summary diagram of the defendants and the above-described corporate relationships is set forth below:

TABLE I: Corporate Relationship of Defendants


Gaylord Entertainment
Word Entertainment (pre-2002)
exclusive distributor for:
"M2 Communications" (1999)
84% of Gaylord value in Viacom equity
alleged fraudulent transfer to Time Warner 2002
Jeffory Moseley
(formed LLC 1999 w/ Warner Alliance group)
Judge Pregerson
(equity owner)
VIACOM
TIME WARNER
partnership in cable and netwks
MTV Networks Group
"M2: Music Television"
1998 lawsuit
1999 reject "crowded field" defense
2004 permanent injunction
partnership for music under MTV Networks brands
Warner Music Group
post-2002 excl. dist.: M2 Comm.
1999 co-creator, licnsr., mftr.: M2 Ent.
mid-litigation merger negotiations rep'd
SFX Entertainment
M2-branded product line dist. by (and transfer to):
Madacy Entertainment
"M2 Entertainment" (1999)
distributed by and owned by Handleman Company
"M2" products co-created (1999), licensed, mftr'd by Warner Music Group

A. Time Warner, Inc. Was a Defendant in Interest to the Litigation

1. The Litigation Sought to Void a 2002 Acquisition by Time Warner, Inc.

In *M2 Communications*, Petitioner sought to void the TW-Word Acquisition as a fraudulent transfer in violation of Cal. Civ. Code § 3439.01 *et seq.*, alleging:

1.) "Gaylord's transfer of the Word Entertainment division to AOL Time Warner is a 'transfer' as that term is defined by Cal. Civ. Code § 3439.01(i) * * *." [*M2Comm* ER04-17/20].

2.) "Plaintiff's damages are a 'claim' as that term is defined by Cal. Civ. Code § 3439.01(b) * * * accrued before Defendant Gaylord's transfer of Word Entertainment to AOL Time Warner was made. * * * [Such transfer was made] with actual intent to hinder, delay or defraud Plaintiff." *Id.*

3.) "[Plaintiff prays] * * * That the Court void as fraudulent the transfer of the Word Entertainment division from Defendant Gaylord to AOL Time Warner, pursuant to Cal. Civ. Code § 3439.07." *Id.*

2. During an Infringement Period, Time Warner, Inc. Was 100% Owner of an Infringing Division as Successor to a Named Party

The *M2 Communications* complaint sought to void the TW-Word Acquisition as a fraudulent transfer. ER04-17/20. Word's former parent Gaylord Entertainment was named as a defendant, eliminating the need to name real party in interest Time Warner, Inc. as a separate party in the "shell game" of ownership that was alleged. The formalities of named parties are not relevant to recusal because, as set forth below, the mandatory recusal requirement is not limited to named parties. 28 U.S.C. § 455(b)(4). After the TW-Word Acquisition, Time

Warner, Inc. – and thus Judge Pregerson – became full owner of the division accused in the lawsuit.

Judge Pregerson's concurring opinions in the Ninth Circuit Orders refusing to recall the mandates, vacate the opinions, and reassign the appeals rely upon a miscasting of Warner Music Group, the music division into which the TW-Word Acquisition was received, as a completely separate entity from Time Warner, Inc. App. 2a, 5a. The Ninth Circuit Orders disregarded that the TW-Word Acquisition occurred in 2002, prior to the 2004 WMG Transaction. In fact, the Word division was a principal part of Time Warner, Inc.'s $2.6 billion dollar sale of Warner Music Group when the 2004 WMG Transaction occurred.[6] Time Warner, Inc.'s direct financial interests were at issue (including Time Warner, Inc.'s proceeds from its 2004 resale of the allegedly void prior acquisition that was the subject of this lawsuit).

3. Time Warner, Inc., and Therefore Judge Pregerson, Held a Direct Financial Interest in Avoiding Infringement Findings

In addition to seeking to void the TW-Word Acquisition, Petitioner sought a permanent injunction in both *Madacy* and *M2 Communications* that would have extended to Time Warner, Inc. Petitioner sought a permanent injunction against defendants "and each of their agents, * * * successors, and assigns" against use of Petitioner's federally-registered **M2** trademark in the manufacturer or distribution of the infringing products. *M2Comm* ER04-19; *Madacy* ER22-17. While Time Warner, Inc. was not formally named as a party, the pleadings identified Time Warner, Inc. as a central defendant in interest – the active, moving participant who had pro-

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[6] *See Supra,* n. 1; *MLPSupp.* ¶2, Ex. 1 at 6 (Word identified to S.E.C. as part of the "principal Recorded Music distribution operations" of Warner Music Group). An album from the **M2**-branded label facing infringement charges was a "top" album for Warner Music Group. *Id.*, at 11 ("Mercy Me" [ER151-72]).

vided the means for the most capital-intensive aspects of the infringement and who recognized significant financial gains from the infringement. *Supra*, n.6. In *Madacy*, Time Warner, Inc. was co-creator, producer, licensor and exclusive manufacturer of the infringing product line rebranded with the **M2** mark.[7] In *M2 Communications*, the new brand was launched by transferring an established group from Time Warner's Warner Alliance label in 1999. Time Warner, Inc. became the direct owner of the exclusive distributor of the **M2** products after 2002.[8]

B. Judge Pregerson Knew of His Financial Interest in a Real Party in Interest and the Subject Matter in Controversy, but Failed to Disclose His Equity Stake to the Parties

The Complaint and the pleadings clearly identified Time Warner, Inc. as a real party in interest to the proceedings with a stake in the subject matter of both litigations. *Supra*, n.7, n.8. Judge Pregerson knew that he owned equity in Time Warner, Inc., but did not disclose this interest to the parties during the proceeding.

On April 18, 2006, the *Washington Post* published a report on violations by certain federal judges of the mandatory recusal statute. *See Washington Post*, April 18, 2006 (A17), "Ethics Lapses by Federal Judges Persist, Review Finds: Violations Involve Stock Holdings

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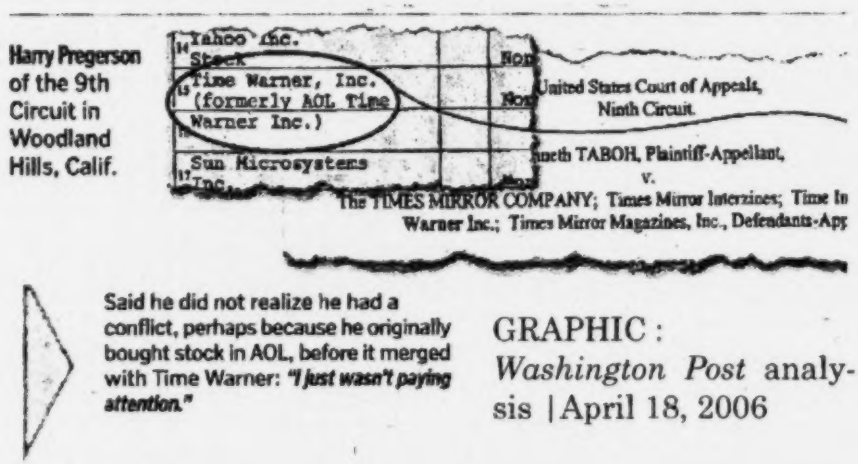
[7] *See* App. 5a; *Madacy* ER-49-64/69 (**M2** co-brand under Warner Special Products); ER292-43 ("Warner Special Products, which is the division of Warner Music Group that helped us create this [**M2**-branded] CD...[and executed] licensing of the music and the manufacturing of the discs.").

[8] *See* App. 2a; *Brief of Appellee Gaylord Entertainment* (filed March 1, 2004) at 2 (claims arise from distribution of the **M2**-branded products, distributed after January 1, 2002 by Warner Music Group); *M2Comm* ER25-12/14; ER65-3; ER151-54 (10-K 2002); ER92-35/37; ER39-4; ER25-44; ER69-10.

and Free Trips").[2] The *Post* article identified Judge Pregerson's equity interest in Time Warner, Inc., criticizing the Judge's failure to recuse himself in an earlier case that had also involved Time Warner, Inc. An accompanying graphic of the disclosure form submitted by Judge Pregerson revealed that Judge Pregerson had knowledge of his financial interest in Time Warner, Inc., as well as knowledge that this company was "formerly AOL Time Warner Inc.":

TABLE II: Washington Post, April 18, 2006


Harry Pregerson of the 9th Circuit in Woodland Hills, Calif.
Yahoo Inc. Stock
Time Warner, Inc. (formerly AOL Time Warner Inc.)
Sun Microsystems Inc.
United States Court of Appeals, Ninth Circuit
TABOH, Plaintiff-Appellant,
v.
The TIMES MIRROR COMPANY; Times Mirror Interzines; Time In
Warner Inc.; Times Mirror Magazines, Inc., Defendants-App
Said he did not realize he had a conflict, perhaps because he originally bought stock in AOL, before it merged with Time Warner: "I just wasn't paying attention."

GRAPHIC : *Washington Post* analysis | April 18, 2006

Thus, Judge Pregerson knew that he owned Time Warner, Inc., knew that the company was "formerly AOL Time Warner, Inc.," and knew that the company was specifically identified in the Complaint as "AOL Time Warner." ER04-17/20. Recusal was automatic, mandatory, and nonwaivable under 28 U.S.C. § 455(b)(4). Mandamus is required to direct the Ninth Circuit to enforce the nondiscretionary statute.

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[2] Declaration of Mark L. Pettinari in Support of Motion to Recall the Mandates and Vacate the Opinions Dated August 31, 2005 and September 12, 2005 and Subsequent Judgments Herein and to Reassign the Appeals to a New Panel ("*MLP Decl.*") at ¶2, Ex. 1 (chart displayed at Ex. 1, page 3).

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III. Proceedings Below

The merits of the underlying decisions go to the risk of injustice, a factor relevant to the analysis of whether allowing a new and impartial panel to take a fresh look at the case would be fairer to the parties than to allow the decisions to stand. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 868 (1988). The underlying appeals were taken in 2003, after a district court entered full or partial summary judgment in *M2Comm* and *Madacy* (with a limited partial trial in *Madacy*). In both appeals, orders were entered in 2003 and 2004 that pre-dated the WMG Transaction.[10] On August 31, 2005, Judge Pregerson authored a decision in which he affirmed summary judgment against Petitioner and in the favor of Time Warner, Inc.'s interests in *Madacy*. *M2 Software, Inc. v. Madacy Entertainment*, 421 F.3d 1073 (9th Cir. 2005), *cert. denied*, ---U.S.---, 126 S.Ct. 1772 (2006) ("*Madacy 2005*"). This was followed on September 12, 2005 by a similar decision that cited *Madacy 2005* in the favor of Time Warner, Inc.'s interests in *M2Comm*. *M2 Software, Inc. v. M2 Communications, LLC*, 149 Fed.Appx. 612 (9th Cir. 2005), *cert. denied*, ---U.S.---, 126 S.Ct. 1772 (2006) ("*M2Comm 2005*").

A. The Underlying Appeals

1. Judge Pregerson Improperly Weighed Facts in the Trademark Infringement Claims

To avoid summary judgment, Petitioner was required only to establish that there existed a genuine issue of material fact. Fed. R. Civ. P. 56(c). The multi-factored

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[10] An Order dated January 30, 2004 granted the defendants a cumulative 73 day extension, allowing the *M2Comm* defendants to defer their opposition brief until after Petitioner had filed its reply brief in the related case. See *Pl.'s Motion to Amend Briefing Schedule* (*M2Comm*, filed 2/3/2004, denied 3/1/2004) and *Pl.'s Motion For Extension to Preserve Briefing Order* (*Madacy*, filed 2/19/2004, denied 2/20/2004).

test of *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979), favored Petitioner:

TABLE III: Judge Pregerson's Weighing of Factors
H=heavy weighting, U=unspecified, S=slight weighting

	Petitioner	Defs.
1) Strength of the mark (**pivotal**);	U	
2) Proximity of the goods (**pivotal**);	S	
3) Similarity of the marks (**pivotal**);	S	
4) Evidence of actual confusion;	[U] [11]	U
5) Marketing channels used;	[U] [12]	H
6) Sophistication of purchasers;		U
7) Defendant's intent;	[*see Supra* n.2-5]	S
8) Likelihood of expansion.		U

The three factors deemed "pivotal" in this type of trademark case indisputably weighed in Petitioner's favor.[13] An appearance of bias stemming from the Judge's ownership of Time Warner, Inc. equity was exacerbated because Judge Pregerson weighed the remaining secondary factors (most susceptible to jury interpretation) for the defendants, and surprisingly affirmed a *summary*

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[11] Where an infringer quickly folds [*Madacy 2005*, 421 F.3d at 1078], actual confusion is not considered. *Gillette Canada, Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). That it nonetheless occurred here immediately is highly probative. *Madacy 2005*, 421 F.3d at 1083.

[12] The District Court weighed "marketing channels" in favor of Petitioner. *Madacy 2005* at 1084. On appeal, the Judge instead rejected evidence that the parties shared exactly the same trade shows because they did not attend in the same year. *Id.* Yet timing goes to actual confusion and damages, not to whether the channels were the same.

[13] *See Dreamwerks Prod. Group Inc. v. SKG Studio*, 142 F.3d 1127, 1130 (9th Cir.1998). The "pivotal" factors: i) the trademark was strong and fanciful, ii) junior users had adopted a substantially identical trademark, and iii) the parties' goods and services were related. *Madacy 2005*, 421 F. 3d at 1080-82. The trademarks collided in the music industry, with promotion at the same music industry trade shows, in the same music industry guides, and to the same labels. *M2Comm* ER78-29/31; ER151-25/28; *Madacy* ER60-21/24; ER49-23.

judgment in favor of the Time Warner, Inc. interests. In so doing, Judge Pregerson was forced to violate *stare decisis*[14] by contradicting an earlier Ninth Circuit decision concerning the same trademark and related corporate defendants – a decision on which Judge Pregerson had been the sole dissenter. *Cf. Viacom,* 30 Fed. Appx. 710.

2.Judge Pregerson's Decision Ignored "Express Aiming" Allegations and Prevented the Time Warner, Inc. Fraudulent Transfer Claim from Being Tried

The appearance of bias is extended because the panel on which Judge Pregerson sat affirmed the personal jurisdiction dismissal of two Time Warner-affiliated defendants in *M2 Communications* by miscasting allegations. The Complaint alleged that the defendants expressly aimed a bad faith trademark infringement intended to damage the federal trademark of a California resident corporation and its position in a pending California-based trademark case. ER04-08. At the pre-discovery stage, the allegations in a Complaint should have been "taken as true" to establish *prima facie* personal jurisdiction. *Calder v. Jones*, 465 U.S. 783, 790 (1984); *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1128 (9th Cir. 2003).

Even prior to discovery, Petitioner provided evidence of express aiming. *See Supra* n. 2-5. Judge Pregerson ignored this evidence and mischaracterized the plain allegations as "[t]he mere fact that M2 Communications owns Viacom stock." *M2Comm 2005*, 149 Fed.Appx. at 615 (emphasis added). Astonishingly, this "mere fact" was *never* alleged. Instead, the allegations were that Defendant Gaylord owned 84% of its value in Viacom equity [*Supra* n. 2-5] and that the defendants

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[14] *See Vasquez v. Hillery*, 474 U.S. 254, 265 (1986); *Spangler v. Abercrombie & Fitch*, 79 Fed.Appx. 325, 326 (9th Cir. 2003); *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir.1993).

"conspired to, and did, launch the present 'M2' venture in an attempt to bolster Viacom's primary defense argument * * * under the doctrine of the crowded field" in a California court. ER-04-08 (emphasis added); ER92-3; ER151-34. By ignoring express aiming, Judge Pregerson affirmed jurisdiction dismissal that had been granted before either defendant had submitted a *single* response to even rudimentary jurisdictional discovery. *M2Comm* ER200-3(#11), 200-13(#98); ER92-4/33. In so doing, Judge Pregerson disposed of the claim of fraudulent transfer, avoiding the financial detriment to his owned company, Time Warner, Inc., that would have resulted had the TW-Word Acquisition been voided.

B. Judge Pregerson's Self-Determination and Denial of the Recusal Motions

The Judge's errors and crucial oversights in the underlying decisions favoring Time Warner, Inc. demonstrates that "there is a greater risk of unfairness in upholding the judgment * * * than there is in allowing a new judge to take a fresh look at the issues." *See Liljeberg*, 486 U.S. at 868. On July 7, 2006, just 15 days after discovering Judge Pregerson's equity stake in Time Warner, Inc., Petitioner filed a motion to recall the mandates, vacate the judgments, and reassign the appeals to a properly constituted panel.

On August 21, 2006, in a decision noted in front-page coverage by the California legal press,[15] Judge Pregerson and the panel refused Petitioner's request to reassign Petitioner's motion and self-determined and denied the motion. Judge Beezer filed a specially concurring opinion in which he concurred *only* as to denial of the request to recall the mandate, concluding the Court lacked jurisdiction to address whether Judge Pregerson was subject to enforcement of the mandatory recusal statute.

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[15] *See, e.g.*, front pages: *San Francisco Daily Journal*, Aug. 23, 2006, "9th Circuit's Pregerson Denies Stock Holdings Affected Cases"; *The Recorder*, Aug. 23, 2006, "Ninth Circuit Panel Rejects Conflict Call"; *The Recorder*, Jul. 11, 2006, "Conflict Claimed in Pregerson Rulings."

REASONS FOR GRANTING MANDAMUS

The cases of this Petition meet the customary requirements for a grant of writ of mandamus. *See* Supreme Court Rule 20. "To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." *Id.* The Petitioner has "the burden of showing that its right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953). This is precisely such a case: The Ninth Circuit's extraordinary failure to police its own Judges' adherence to the mandatory recusal provisions of 28 U.S.C. § 455 creates the exceptional circumstance requiring a writ of mandamus from this Court. *See La Buy v. Howes Leather Company,* 352 U.S. 249, 256 (1957) (approving mandamus should the Court find "that the rules have been practically nullified" by the lower court Judge).

It is well-settled that a mandamus petition is the proper procedure to review a lower court Judge for disqualification from a case in which he or she owns a financial interest or where there is an appearance of bias:

> A judge's refusal to recuse himself in the face of a substantial challenge casts a shadow not only over the individual litigation but over the integrity of the federal judicial process as a whole. . . In recognition of this point we have been liberal in allowing the use of the extraordinary writ of mandamus to review orders denying motions to disqualify.

Union Carbide Corp. v. U.S. Cutting Service, Inc., 782 F.2d 710, 712 (7th Cir. 1986) (citations omitted). *See also In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 961 n.4 (5th Cir. 1980); *In re Int'l Bus. Machines Corp.*, 618 F.2d 923, 926 (2d Cir. 1980) ("there are 'few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself'").

"[D]ue process * * * [requires] that a judge who is otherwise qualified to preside * * * must be sufficiently neutral and free of disposition to be able to render a fair decision." *Collins v. Dixie Transport, Inc.*, 543 So.2d 160, 166 (1989), citing *Berger v. United States*, 255 U.S. 22, 33 (1921); Wolfram, *Modern Legal Ethics* § 17.5.5 Independence and Neutrality, p. 989 (1986).

Mandamus is particularly appropriate here because the Judge failed to disclose his equity stake when he noted that Time Warner was identified in the Complaint and the pleadings. A Judge is always obligated to disclose a potential conflict, "even if the judge believes there is no real basis for disqualification." *See* Commentary to Canon 3E(1). Disclosure is "a separate obligation * * * that is broader than the duty to disqualify." *In the Matter of Edwards*, 694 N.E.2d 701, 711 (Ind. 1998).

A corporation is owned by its shareholders. When a Judge purchases stock in a corporation, he is taking sides, effectively becoming a part of that company's "team." A Judge may not rule for his own team: Recusal with an equity ownership is automatic, mandatory, and nonwaivable under the modern recusal statute. 28 U.S.C. § 455(b)(5) (automatic and mandatory recusal where Judge "[i]s a party to the proceeding" or "is known * * * to have an interest that could be substantially affected by the outcome of the proceeding"); 28 U.S.C. § 455(b)(4) (automatic and mandatory recusal where "he knows that he * * * has a financial interest in the subject matter in controversy or in a party to the proceeding"); § 455(e) (no waiver option for "any ground for disqualification enumerated in subsection (b)"). This is true even if the Judge owns a single share of stock. [16]

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[16] *See* www.uscourts.gov/ttb/jun98ttb/reminder.html. Ownership of a single share triggers a recusal requirement under the mandatory language of Canon 3 of the Code of Conduct for United States Judges. *See* Advisory Opinion 20. http://www.uscourts.gov/guide/vol2/20.html. This requirement extends to subsidiaries. Advisory Opinion No. 57. http://www.uscourts.gov/guide/vol2/57.html. *See* 28 U.S.C. § 455(d)(4).

The Judge refused to disqualify himself, the Ninth Circuit denied Petitioner's motion, and the Ninth Circuit refused to rehear the matter *en banc*. Thus, there is no adequate alternative means to obtain relief. Sup. Ct. Rule 20. A writ of mandamus is necessary to correct the unmistakable message that § 455 is not being enforced in the Ninth Circuit, or is otherwise being treated cavalierly by allowing a Judge to self-determine a motion for his own recusal.

I. Judge Pregerson Was Indisputably Subject to the Automatic and Mandatory Recusal Provisions of 28 U.S.C. § 455

Disqualification was mandatory because the Judge owned equity in the real defendant in interest and the subject matter in controversy. 15 U.S.C. §§ 455(a), 455(b)(4), 455(b)(5). Judge Pregerson denied his own disqualification by overlooking the period of infringement prior to the March 2004 WMG Transaction, weighing Time Warner's continuing ownership of convertible securities for a half-billion dollar stake in the affected division to find that such an interest was too indirect to present a conflict. The panel agreed, denying Petitioner's motion. This subjective test contradicted the statute, which requires automatic recusal for ownership of any financial interest, "however small." § 455(d)(4).

A. 28 U.S.C. § 455(b)(4) – Judge Pregerson's Equity Interest in Time Warner, Inc. Was a "Financial Interest" in the Subject Matter in Controversy or a Party to the Proceeding.

Adopting an argument similar to that of the conflicted Judge in *Liljeberg*, 486 U.S. at 868, Judge Pregerson acknowledged that he owned an equity interest in Time Warner, Inc., but denied knowledge of Time Warner's continuing interest in the Warner Music Group:

> Unbeknownst to me, Time Warner had an option (never exercised) to purchase up to 19.9% of Warner Music – also not a party to this suit. * * * War-

> ner Music owned Word Entertainment, not a party to this suit either. * * *

App. 1a-2a. In support of this statement, Judge Pregerson relied upon a November 24, 2003 article (from prior to the actual March 1, 2004 WMG Transaction) and a June 13, 2005 S.E.C. filing (from after Judge Pregerson presided over oral argument on February 7, 2005).[17] *Id.*

The Judge's lack of knowledge of Time Warner, Inc.'s continuing option interest suggests that he may have been unaware of the WMG Transaction *in toto*. If that is the case, Judge Pregerson could have simply believed that Time Warner, Inc. continued to own its music division. Judge Pregerson indisputably acknowledged his ownership of an equity interest in Time Warner, Inc. App. 1a, 4a. A reasonable person would conclude that Judge Pregerson knew of his financial interest in a real party in interest to the proceeding or the subject matter in controversy for *at minimum* the issues that arose, and for which liability accrued, in the period of infringement from March 1999 until the March 1, 2004 WMG Transaction. This time period included the TW-Word Acquisition, which Time Warner executed in 2002. ER39-4. Under § 455(b)(4), recusal was automatic, mandatory, and nonwaivable. *The Chase Manhattan Bank v. Affiliated FM Insurance Co.*, 343 F.3d 120, 138 (2d Cir. 2003).

B. 28 U.S.C. § 455(a) – There Was at Minimum an Appearance of Partiality.

The statute imposes upon the Judge a duty to remain informed about his financial interests. 28 U.S.C. § 455(c). Judge Pregerson's claim to the *Washington Post* that he did not know he owned Time Warner, Inc. after the AOL Time Warner merger does not overcome the

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[17] Whether the 2007 stock option for a 19.9% interest has been exercised, or subsequently sold, is irrelevant. Where a financial conflict of interest existed at any point in the appeal, all future orders are void. *Tramonte v. Chrysler Corp.*, 136 F.3d 1025 (5th Cir. 1998).

"appearance" test. *See The Chase Manhattan Bank*, 343 F.3d. at 130 ("a judge's 'forgetfulness' is not 'the sort of objectively ascertainable fact that can avoid the appearance of partiality'"), citing *Liljeberg*, 486 U.S. at 860. Knowledge is not required under § 455(a).

C. 28 U.S.C. § 455(b)(5) – Judge Pregerson Was a "Party" to the Proceeding

On January 4, 2002 Time Warner acquired Word Entertainment, exclusive distributor and facilitator of the alleged infringement. *M2Comm* ER39-4. Petitioner named Gaylord in the Complaint as Word's full owner at the time of launch and the entity already involved in the related proceeding at the Trademark Trial and Appeal Board (T.T.A.B. Opp. No. 91/124,775, filed Oct. 3, 2001). ER04-8-20. When Time Warner, Inc. took control of the infringing division in the alleged fraudulent transfer, Time Warner, Inc. "stepped into" Defendant's shoes. Judge Pregerson, as an equity owner of Time Warner, Inc., became a party in interest to his own case. *See, e.g.*, *Dacey v. Connecticut Bar Ass'n*, 184 Conn. 21, 28 (Conn. 1981). Knowledge is not required under § 455(b)(5).

II. The Published Orders Contradict the Opinions of the Federal Judiciary's Advisory Committee

A. The Mandatory Recusal Requirement is Not Limited to Named Parties

The modern recusal statute does not limit disqualifying conflicts to named parties. Yet, that is precisely the focus applied by Judge Pregerson in his decision not to fulfill his automatic duty to recuse. App. 1a-2a, 4a-5a ("not a party * * * not a party"). The Advisory Committee of the federal judiciary has unequivocally clarified that the statutory language "party to the proceeding" extends to mandatory recusal where a Judge

owns a "real party in interest" regardless of the parties formally named in the complaint.[18]

Judge Pregerson cited the disclosure requirement of Rule 26.1 to support his limitation of recusal analysis to named parties. App. 2a, 5a (noting that rule requires only listing of parties and "parent corporations and corporations that own 10% of the entities stock"). Such a narrow interpretation would not serve to promote justice if a Judge were to be able to point to the technicality of whether his conflict included a formally-named party while sitting on a case otherwise involving his financial interests. Judge Pregerson's citation of Rule 26.1 to support his limitation to named parties is contradicted by the Local Rules of other Circuits relating to this Rule. *See, e.g.*, Third Circuit LAR 26.1 ("If there is a publicly held corporation which is not a party to the proceeding but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.").

Moreover, section 455(b)(4) also requires automatic and mandatory recusal where a Judge knows he owns a financial interest in the "subject matter in controversy." This clause extends precisely to situations like the present where a Judge owns a company that is identified in the complaint or the pleadings as the manufacturer or distributor of the infringing products. *See Compendium*, § 3.1-1(k) ("A judge owning stock in a company that is not a party but produces the product that is the subject of litigation should recuse where the judge's award could influence the initiation of subsequent claims against the company * * *"). It also encompasses the present case where a Judge owns a company that will be faced with an indemnification burden or other

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[18] *See Advisory Committee's Compendium of Selected Opinions on the Code of Conduct of United States Judges* (Guide to Judiciary Policies and Procedures, Vol. 2, Ch. V) ("*Compendium*"), § 3.1-1(h) (recusal where judge "owns stock *[in] a real party in interest in the litigation,*") citing "owns stock *in a party*" language of Advisory Opinion No. 20.

potential contributory liability depending upon the Judge's decision. *See, e.g., Sollenbarger v. Mountain States Tel. and Tel. Co.*, 706 F. Supp. 776, 779 (D. N.M. 1989) (disqualification required where the judge owned stock in non-party that could have faced liability depending on verdict). *See MLPSupp.*, at ¶2, Ex. 1 at 14 (S.E.C. filing acknowledging that Time Warner, Inc. would continue to administer Warner Music Group and indemnify it for willful misconduct after WMG Transaction).

B. The Modern Recusal Statute Does Not Allow a Judge Discretion to "Weigh" His Conflict but Requires Automatic Disqualification Where a Judge Owns a Financial Interest

Judge Pregerson ignored Time Warner, Inc.'s interest and potential liability from the infringement period prior to the 2004 WMG Transaction, and weighed as too "indirect" Time Warner, Inc.'s continuing interest and liability after the 2004 WMG Transaction. App. 2a, 5a. The modern recusal statute does not permit this type of subjective analysis: Congress did not intend to leave any discretion to a judge holding any financial interest. *Liljeberg*, 486 U.S. at 860 n.8. 28 U.S.C. § 455(b) sets forth specific situations in which disqualification is automatic, mandatory, and nonwaivable in order to "eliminate the uncertainty and ambiguity arising from the language in the existing statute * * *." H.R. Rep. No. 93-1453, reprinted in 1974 U.S.C.C.A.N. 6351, 6355. The Ninth Circuit should not have allowed Judge Pregerson's subjective weighing of the "directness" of conflict, as the statute unambiguously requires a Judge recuse with *any* financial interest in a party or the subject matter in controversy, "however small." § 455(b)(4).

C. Convertible Securities Must Be Treated As Stock for Recusal Analysis

Limiting his analysis to the post-2004 period, Judge Pregerson's concurring opinions fail to consider that a stock option interest creates the same conflict of interest as stock. After March 1, 2004, Time Warner

continued to own convertible securities for a 19.9% stake in Warner Music Group not due to expire until 2007. *Supra* n.1. The conflict presented can be illustrated by a hypothetical example whereby a 19.9% stake is purchased via option, on the one hand, and stock, on the other, in a company represented in total by 100,000 shares of a $100 per share stock. If 19,900 call options are purchased with a strike price of $50 per share (at a price of the intrinsic value ($100-$50=$50) plus a premium *p*)[19] and the stock gains to $125 per share, the new intrinsic value of the stock options will be $75. The owner of both instruments will realize the same gain of $25 per share, netting the same $497,500 profit on 19,900 shares (net of the option premium *p*).

The Advisory Committee has studied the issue of this potential financial equivalence and has concluded the same financial conflict is presented: "Convertible securities are treated as stock for recusal purposes." *Compendium*, § 3.1-5 (emphasis added).[20] The "benchmark" that triggers recusal is a 10% interest in a subsidiary by a parent corporation owned by a Judge. *Compendium*, § 3.1-1(f). Time Warner's equity interest control of a 19.9% stake via convertible securities is double the 10% benchmark. *Id.* Treating the option as stock, as the Advisory Committee instructs, required recusal.[21]

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[19] A stock option is valued by the difference between the stock price and strike price (the *intrinsic* value), plus a premium *p* that is primarily a function of time and volatility. *See Custom Chrome, Inc. v. Commissioner*, 217 F.3d 1117, 1125 (9th Cir. 2000) ("An option has two values: an intrinsic value and a time value.").

[20] The academic and medical research communities have also concluded that stock options present the same conflict as stock. *See, e.g. National Science Federation Grant Policy Manual* (NSF 05-131 July 2005), § 510. http://www.nsf.gov/pubs/manuals/gpm05_131/gpm5.jsp#510.

[21] The inapposite case cited by Judge Pregerson [App. 2a, 5a] to characterize the stock option as an "indirect" interest involved indirect bias stemming from criticism by political figures, not a financial interest. *See United States v. Bayless*, 201 F.3d 116, 127 (2d Cir. 2000).

III. Whether There Is a Greater Conflict in the *M2 Communications* Case or the *Madacy* Case, Recusal Is Required In Both

If conflict is shown in *M2Comm* (where Time Warner, Inc. was a direct 100% owner of the infringing division) it must also apply to *Madacy* (where Time Warner, Inc. served as co-creator, licensor, and manufacturer of the infringing line). Where resolution of one related case is tainted by an appearance of bias, all are tainted. *See In re Aetna Casualty & Surety Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990) (recusal for all related cases: a "decision on the merits of any important issue in any of the seven cases * * * could constitute the law of the case in all of them, or involve collateral estoppel, or might be highly persuasive as precedent.") Recusal is necessary in related cases regardless of the order of the decisions, since an appearance of bias can be caused by a perception that a senior decision was rendered for "preclusive effect" in a subsequent case of conflict. *See Gordon v. Reliant Energy, Inc.*, 141 F.Supp. 2d 1041, 1044-46 (S.D. Cal. 2001). The same considerations apply here, where *M2Comm 2005* and *Madacy 2005* were heard together, and the junior decision relied on the senior decision for foundational determinations. *See M2Comm 2005,* 149 Fed.Appx. at 614 (citing *Madacy 2005*).

IV. Judge Beezer's Specially Concurring Opinion Contradicts *Liljeberg* Because Judge Beezer Fails to Recognize That the Issue Is Nondiscretionary

Judge Beezer did not fully concur with Judge Pregerson's analysis. The Ninth Circuit's Orders of August 21, 2006 decided several components:

1.) A motion to recall the mandate, vacate the opinion, and reassign the appeals to a new properly constituted panel (DENIED, App. 1a, 4a);
2.) A request that the recusal motion be assigned to a new panel (DENIED, *Id.*); and
3.) Defendants' request for sanctions (DENIED, *Id.*).

Judge Beezer, "specially concurring," concurred with only two components of the Orders:

> I concur in the court's order denying the motion to recall the mandate and the denial of the motion for sanctions. Because the mandate is not recalled, I believe we have no jurisdiction to address the challenge to Judge Pregerson's participation in this appeal.

App. 2a-3a, 5a-6a (emphasis added). By finding that the Ninth Circuit had "no jurisdiction" to address the 28 U.S.C. § 455 challenge, Judge Beezer avoided having to answer any of the questions raised herein as to Judge Pregerson's violation of the mandatory recusal statute.

Instead, Judge Beezer's special concurrence suggested that the higher standards for a motion to recall ("fraud * * * gross misconduct * * * manifestly unconscionable") should apply if the basis for recusal is not discovered until after the conflicted Judge has delivered his opinion. App. 3a, 6a. Judge Beezer's position contradicted this Court's earlier precedent of *Liljeberg* in which this Court rejected a similar argument:

> But to the extent the provision can also, in proper cases, be applied retroactively, the judge is not called upon to perform an impossible feat. Rather, he is called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary. If he concludes that "his impartiality might reasonably be questioned," then he should also find that the statute has been violated. This is certainly not an impossible task. No one questions that Judge Collins could have disqualified himself and vacated his judgment when he finally realized that Loyola had an interest in the litigation.

Liljeberg, 486 U.S. at 861 (emphasis added).

Judge Beezer's alternative position that judicial equities – "the interests of finality and repose" – would prevent a 28 U.S.C. § 455 motion from being brought after judgment disregards that the issue is nondiscretionary and that a conflicted Judge holds control of timing:

> [The Judge's] failure to disqualify himself * * * also constituted a violation of § 455(b)(4) * * * further compels the conclusion that vacatur was an appropriate remedy; by his silence, [the Judge] deprived respondent of a basis for making a timely motion * * * [and] deprived it of an issue on direct appeal.

Liljeberg, 486 U.S. at 867-68. *Cf.* App. 3a, 6a.

This Court noted that if a Judge had properly disclosed his interest "when his knowledge * * * was renewed, respondent could have raised the issue * * * on appeal without requiring that the case be reopened." *Id.* at 863 n.11. Judge Pregerson knew of his ownership of Time Warner, Inc. at the latest when he filed his disclosure statements. *Supra*, Table II. Even if this were not true, Judge Pregerson specifically noted his ownership of Time Warner, Inc. stock in a *Washington Post* interview that took place on or before April 17, 2006 – possibly before the certiorari ruling, and indisputably before the rehearing ruling of June 12, 2006. U.S.S.C. 05-967. Judge Pregerson should have "disqualified himself and vacated his judgment" at that time. *Liljeberg*, 486 U.S. at 861. As in *Liljeberg*, disclosure even at that late date would have eliminated the need to reopen the case and confront the interests of "finality and repose" of Judge Beezer's concern. App. 3a, 6a.

This is the rare case where a difficult-to-discover nondisclosure has been brought to light. The *only* check or balance for the Court of Appeals' compliance with 28 U.S.C. § 455 disclosure provisions is a Petition like the present. The signal sent by the Ninth Circuit published Orders is that the best strategy for an Appeals Court Judge is <u>never to disclose</u> a conflict: If the affected party happens to discover the conflict in the weeks or months after judgment, applying Judge Beezer's opinion, the Judge is free and clear and the ruling must stand no matter how great the appearance of bias or how egregious the conflict because "the interests of finality and repose" will ultimately control. App. 3a, 6a. Such a rule

is extraordinarily unfair to the party who must stand with a decision rendered by a conflicted judge, and threatens to destroy public confidence in the judiciary.

The Constitutional right to have one's case decided by an impartial adjudicator is "among those basic fair trial rights that can never be treated as harmless." *Gomez v. United States*, 490 U.S. 858, 876 (1989). "[T]he Due Process Clause of the Constitution entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). *See also Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 831 (1986); *Liljeberg*, 486 U.S. at 865 n.12; *Tumey*, 273 U.S. at 523. Where a person is deprived of a properly-constituted panel, "the judgment must be set aside." *See United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 690-691 (1960). *See also Compendium*, § 3.1-1(e) ("The fact * * * that recusal would involve great inconvenience is immaterial; recusal is mandatory.").[22] Recusal here was automatic, mandatory, and nonwaivable. The Ninth Circuit derogated its duty to enforce the nondiscretionary statute. A writ of mandamus is required to ensure that 28 U.S.C. § 455 will be followed by the Courts of Appeals now and in the future to promote the appearance of justice.[23]

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[22] This Petition is not a referendum on the character of Judge Pregerson, who has devoted many years of otherwise conflict-free service to the bench. A violation of §455 does not depend on proof that the conflict affected the Judge's actions. See *Miller Industries, Inc. v. Caterpillar Tractor Co.*, 516 F.Supp. 84, 90 n.2 (S.D.Ala.1980) (extending to Judge Hand a "welcome to the club" of judgments required to be vacated). *See also The Chase Manhattan Bank*, 343 F.3d at 128. The mandatory language of 28 U.S.C. §455 places upon the Judge the duty to recuse. *Sao Paulo State v. Am. Tobacco Co.*, 535 U.S. 229 (2002).

[23] At minimum, this Court should summarily reverse under Rule 16.1 to require enforcement of the mandatory recusal statute. Sup. Ct. Rule 16.1 Close questions must be decided in favor of recusal. *See Republic of Pan. v. American Tobacco Co.*, 217 F.3d 343, 347 (5th Cir. 2000); *In re United States*, 158 F.3d 26, 30 (1st Cir. 1998); *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995).

CONCLUSION

Accordingly, for the foregoing reasons, the petition for a writ of mandamus should be granted.

Respectfully submitted,

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